Supreme Court, U.S.
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No. 00-617

IN THE
Supreme Court of the United States

INTERNATIONAL AIRCRAFT RECOVERY, LLC,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

DAVID PAUL HORAN
Counsel of Record
EDWARD W. HORAN
HORAN, HORAN & WALLACE, LLP
Attorneys for Petitioner
608 Whitehead Street
Key West, Florida 33040-6549
(305) 294-4585

164984

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

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ARGUMENT

THERE IS NOT ONLY A CIRCUIT COURT CONFLICT, BUT A CONFLICT WITH THIS COURT OVER THE ADMIRALTY LAW STANDARD FOR ABANDONMENT.

There can be no good faith argument that there is a division among the Courts of Appeal with respect to the appropriate common law standard for the trial court's determination of fact driven "abandonment" in the context of an *In Rem* salvage action. The Respondent United States admits, in passing, that there may be . . . "some division among the Courts of Appeal" regarding the meaning of "abandoned" under admiralty law. (Resp. 9-10) The Respondent then attempts to avoid the obvious Circuit Court conflicts by arguing that there should be two (2) *totally distinct* standards of abandonment as to all *In Rem* Defendants. The United States "concedes" that allowing our admiralty courts to "imply" abandonment based upon all of the factual circumstances may be "acceptable" *except* in salvage actions where a sovereign nation intervenes and claims ownership. During the last year, this Court has refused two Petitions for Certiorari presenting the opportunity to establish a national standard of "abandonment". In *Yukon Recovery, LLC v. Certain Abandoned Prop.*, 205 F.3d 1189 (9th Cir.), *cert. denied*, 121 S. Ct. 62 (2000) and *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 203 F.3d 291 (4th Cir.), *cert. denied*, 121 S. Ct. 277 (2000), many of the Amici and the Respondents had argued that there were no "Circuit Court conflicts" over a uniform admiralty standard for abandonment and that the alleged conflicts were a "fiction" manufactured by the Petitioners. Now the United States concedes that a national standard is needed, but argues that this is not the case or the time.

Presently pending before this Court are two (2) other Petitions for Writ of Certiorari: *Commonwealth of Virginia v. Kingdom of Spain*, Petition for Certiorari # 00-629; and *Sea Hunt, Inc. v. Kingdom of Spain*, Petition for Certiorari # 00-652. The opposition of the United States to this Court's issuance of the Writ in *International Aircraft* is *exactly* the position taken by the Kingdom of Spain in its January 11, 2001 Brief in Opposition to the issuance of the Writ in *Commonwealth of Virginia* and *Sea Hunt, Inc.*.

The United States seeks to avoid this Court's holding in *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998) by arguing that *Deep Sea Research only* . . . "concerned property governed by the Abandoned Shipwreck Act of 1987" (Resp.7) or that *Deep Sea Research* merely holds that . . . "the Eleventh Amendment does not bar a federal court exercising admiralty jurisdiction from adjudicating claims against state property that is not within the state's actual possession." (Resp.11) If *Deep Sea Research* involved "only" claims by a state or vessels covered by the Abandoned Shipwreck Act (ASA), why did this Court state (as the primary legal foundation for it's unanimous Opinion) . . . "Proceedings *In-Rem* to enforce a lien against property of the United States are only forbidden in cases where, in order to sustain the proceeding, the possession of the United States must be invaded under process of the Court." *Deep Sea Research*, 523 U.S. at 507. The United States mischaracterizes the holding of this Court in *Deep Sea Research* to avoid having to acknowledge that this Court *requires* enforcement of a valid maritime lien against property of the sovereign nation *unless* the property is in the actual possession of a sovereign nation when the *In Rem* salvage action is initiated. In the special concurrence of Justice Stevens in *Deep Sea Research*, 523 U.S. at 509,

he cites two hundred year old Opinions, by Justice Story and Justice Washington for the proposition that if the actual possession of the sovereign does not have to be invaded under process of the Court, then it is the Court itself, not the salvor, that has "possession of the thing" and maritime salvage liens are to be satisfied from the salvage. *Deep Sea Research*, 523 U.S. at 502. The United States seeks to avoid these Opinions which clarify that in admiralty and maritime *In Rem* actions . . . "the property in dispute is generally in the possession of the Court, or of persons bound to produce it, or its equivalent".

The United States Brief in Opposition attempts to avoid having this Court address the Circuit Court conflicts which are based upon the burden of proof in admiralty cases involving "abandonment" of the *res*. The Eleventh and Fourth Circuits now hold that once an admiralty court has undisputable possession of a *res*, the intervention by a sovereign nation claiming ownership of the *res* at the time of its loss, *immediately shifts the burden of proof* to the Plaintiff/Salvor (or the states under the ASA) who must then show that the sovereign has, at some time in the past, "affirmatively abandoned" its ownership claim to the *res*. The United States (and the Kingdom of Spain, in the *Commonwealth of Virginia* and *Sea Hunt* Petitions), seeks to avoid having this Court review the factual and legal concept of "express abandonment" which the United States and the Kingdom of Spain assert are always "dispositive" of their intervening claims. The admiralty courts use of "express abandonment" is *always* dispositive as to the intervening sovereign's ownership of the *res* and this "ownership" *always* allows the sovereign to reject further salvage services regardless of the existence of maritime peril and regardless of the time, funds and resources that have been expended in search and salvage of the *res*.

As an officer of this Court, it is disturbing that the United States actually argues that the holding the Eleventh Circuit requiring that a salvor show "express abandonment" by a sovereign intervenor will not harm implementation of the ASA. The United States goes so far as to state . . . "The holding thus does not apply to the Abandoned Shipwreck Act or otherwise implicate questions concerning that Act's meaning or implementation." (Resp. 12) The United States is marching in "locked step" with the Kingdom of Spain in asserting that . . .

> The principle that an owner may refuse salvage extends to wrecked vessels and other property lost at sea even if the property has been lost for many years. Thus, in *Sea Hunt, Inc., supra*, . . . consistent with the decision here, the Court of Appeals in that case held that: "Despite the passage of nearly two hundred years, Spain has not abandoned its ownership of the vessels [*La Galga*, lost in 1750]; Spain has expressly communicated its refusal of salvage services to the salvors; and the salvor therefor could not go forward over the owner's objection." (Resp. 14)

Using our God-given common sense, it *should* be obvious that until such time as the legal concept of "express abandonment" has been the subject of sovereign legislation there could *never* be an "express abandonment" under the factual criteria advanced by the United States and the Kingdom of Spain and adopted by the Eleventh and Fourth Circuits.

When the Spanish Vessel, *La Galga*, was lost off the coast of what would later become the United States (*over* two hundred fifty years ago), the legal concept of

"express abandonment" did not even exist. As far as can be ascertained, it may not *presently* exist in the laws of the Kingdom of Spain. Why should it?

When the Navy lost the TBD-1 Devastator Aircraft in international waters beyond the territorial limits of the United States in July 1943, there was no procedure or legal concept of "express abandonment" because there was no Congressional legislation allowing an administrative official to expressly and affirmatively renounce ownership rights in Naval aircraft. If aircraft were shot down, crashed, scrapped or pushed over the sides of aircraft carriers on the way home after the war, the aircraft documents were stamped "STRICKEN" and that — was that! (Pet.App. A at 7a-10a) Until such time as the United States recognized the legal concept of "express abandonment" by a legislative act and provided the power of "express abandonment" to an administrative official, *it is an exercise in futility* to require our admiralty courts to uphold the intervening sovereign's ownership claim to a *res* lost in deep international waters before a legal procedure for "express abandonment" had been authorized by Congress. The rebuttable presumption in such cases should be in *favor* of abandonment.

On page 8 of the Kingdom of Spain Brief in Opposition in *Commonwealth of Virginia* and *Sea Hunt*, it is argued that, "The immunities extended to Spain's vessels by the 1902 Treaty include the preclusion of implied abandonment of United States property under the *Property Clause* of the Constitution. (U.S. Constitution, Article IV, Section 3)" (emphasis supplied) The United States argues that the . . . "Well settled doctrine rooted in the *Property Clause* of the Constitution holds that the federal government's interest in property may not be impliedly abandoned, but rather can *only*

be relinquished by and express, affirmative renunciation of property rights that is duly authorized by Congress." (emphasis in original) (Resp. 9) The problem with this argument is that Article IV, Section 3 of our Constitution is entitled *"Public Lands"*. Article IV, Section 3 is not only "land based law", it is "public *lands* based law". Attempting to use land based law and apply the "*Public Lands*" Article of our Constitution to the loss of an aircraft or vessel in international waters, whose existence and location was forgotten by the United States for over half a century and whose location has been totally disregarded for over ten years, is not a good faith logical argument. Reliance on "Land Based" law in the context of an *in rem* admiralty action is misplaced. This was pointed out by Justice Stevens in his concurring Opinion in *Deep Sea Research*, 523 U.S. at 510:

> That reasoning [in this Court's *Treasure Salvors* Opinion] would have been sound if we were deciding an ejectment action in which the right to possession of a parcel of real estate was in dispute . . . [But] . . . having given further consideration to the special characteristics of *In Rem* admiralty actions, and more particularly to the statements of Justice Story and Justice Washington . . . I am now convinced that we should have affirmed the Treasure Salvors Judgment in its entirety.

Justices Kennedy, Ginsburg and Breyer joined Justice Stevens in his concurrence concluding . . . "It ought to be evident that the issue [possession or non-possession] is open to reconsideration."

CONCLUSION

The time is now. This case and *Commonwealth of Virginia* and *Sea Hunt* are the *perfect* cases that will allow this Court to set a coherent fact based standard for adjudication of "abandonment" by our admiralty Courts. Article III, Section 2 of our Constitution requires it.

Respectfully submitted,

DAVID PAUL HORAN
Counsel of Record
EDWARD W. HORAN
HORAN, HORAN & WALLACE, LLP
Attorneys for Petitioner
608 Whitehead Street
Key West, Florida 33040-6549
(305) 294-4585